Supreme Court, U.S.
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No. 02-1864

IN THE

Supreme Court of the United States

SALLEE A. CONOVER,

Petitioner,

v.

AETNA INC., F/K/A AETNA U.S. HEALTHCARE INC.; AETNA LIFE INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, preempts tort claims, asserted under Oklahoma common law, for bad-faith denial of benefits under an ERISA plan.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties.

Respondent Aetna Inc. is the successor to Aetna U.S. Healthcare Inc., which was a defendant-appellee in the court below.

RULE 29.6 STATEMENT

The parent company of respondent Aetna Life Insurance Co. is respondent Aetna Inc., a publicly traded company.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Aetna Inc. (as successor to Aetna U.S. Healthcare Inc.) and Aetna Life Insurance Co. respectfully request that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 320 F.3d 1076 (10th Cir. 2003). The order of the district court concluding that petitioner's common law tort claim is preempted by ERISA (Supp. Pet. App. 29a-39a) is reported at 167 F. Supp. 2d 1317 (N.D. Okla. 2001). The order of the district court entering judgment for respondents (Supp. Pet. App. 27a-28a) is not reported.

JURISDICTION

The judgment below was entered on February 20, 2003. Pet. App. 1a. A timely petition for rehearing was denied on March 21, 2003. *Id.* at 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Through her employer, petitioner participated in an employee benefit plan that included long-term disability insurance coverage. Pet. App. 2a. Under the terms of the plan, beneficiaries who became totally disabled could obtain supplemental benefits for a prescribed period of time, subject to the condition that benefits would be suspended absent periodic certification of continued disability. Supp. Pet. App. 30a. As the plan documents stated, the plan was covered by and regulated under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* Respondent Aetna Life Insurance Co. ("ALIC") administered and insured the long-term disability plan. Supp. Pet. App. 30a.

After she was injured in a car accident, petitioner submitted a claim for long-term disability benefits under the plan. Petitioner was certified as disabled and thereafter began to receive monthly disability benefits. Pet. App. 2a. Several months later, petitioner's regularly scheduled Functional Capacity Evaluation determined that she was no longer disabled from performing the material duties of her job. Based on the evaluation, ALIC suspended petitioner's benefits in accordance with the terms of the plan. Supp. Pet. App. 30a. As detailed below, ALIC subsequently resumed the benefit payments and paid the suspended benefits once new information led it to conclude that petitioner was still disabled.

2. After her benefits were suspended, petitioner filed suit against Aetna U.S. Healthcare Inc. in Oklahoma state court. Her petition asserted causes of action for intentional breach of contract and for bad faith under Oklahoma common law. Pet. App. 2a; *see* App., *infra*, 9a-11a. Aetna U.S. Healthcare removed the action to the United States District Court for the Northern District of Oklahoma on grounds of diversity of citizenship and of federal question jurisdiction based on the "complete preemption" doctrine. Pet. App. 2a; *see* App., *infra*, 1a-4a. Under that doctrine, a claim that is "completely preempted" by the exclusive remedial scheme set out in ERISA § 502(a), 29 U.S.C. § 1132(a), presents a federal question and is subject to removal on that basis, even if on its face it purports to assert only state-law claims. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). Petitioner did not contest the removal or move to remand.[1]

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[1] After removal, because of the possibility that Aetna U.S. Healthcare was not the proper defendant in an action pertaining solely to disability insurance benefits, the parties stipulated to the addition of ALIC as a defendant, although neither Aetna U.S. Healthcare nor ALIC conceded liability.

As the litigation proceeded in district court, petitioner presented ALIC with further information about her medical condition. ALIC determined, based on this previously unavailable information, that petitioner remained eligible for total disability benefits. It accordingly reinstated her benefits retroactively and paid her a lump sum covering the period of the suspension. Pet. App. 2a. ALIC's complete satisfaction of the terms of the plan mooted petitioner's claim for breach of contract. Supp. Pet. App. 27a-28a.

ALIC asserted that petitioner's sole remaining claim, for bad-faith denial of benefits, was preempted by ERISA. Adhering to circuit precedent, the district court agreed.

In *Gaylor v. John Hancock Mutual Life Insurance Co.*, 112 F.3d 460 (10th Cir. 1997), the Tenth Circuit had considered the identical Oklahoma common law tort and held that *either* of two distinct forms of ERISA preemption was sufficient to bar the plaintiff's action. The Tenth Circuit held that a tort claim under Oklahoma law alleging bad faith in the administration of benefits was preempted by ERISA § 514(a), 29 U.S.C. § 1144(a), which supersedes any state law that "relate[s] to" an ERISA plan. *Gaylor*, 112 F.3d at 465-66. In the alternative, the *Gaylor* court held that such a state tort claim was completely preempted by ERISA § 502(a), 29 U.S.C. § 1132(a). That section provides the exclusive remedies for violations of ERISA and, as this Court first established in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), precludes a State from supplementing those remedies. *Gaylor*, 112 F.3d at 466 (citing *Pilot Life*, 481 U.S. at 52). The district court in this case followed *Gaylor* in both respects.

a. Turning first to the Section 514 issue, the district court explained that because there was no serious dispute that the state tort claim "relate[d] to" the ERISA plan, the only real question was whether the bad-faith cause of action was saved from preemption under an exception to Section 514's

broad rule. *See* Supp. Pet. App. 31a & n.2. Petitioner argued that the cause of action survived pursuant to the Insurance Saving Clause, ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which saves from preemption any state law that "regulates insurance." Supp. Pet. App. 31a. The Tenth Circuit had rejected just that contention in *Gaylor*, holding that the Oklahoma bad-faith tort was not an insurance regulation within the meaning of the saving clause. *Id.* (citing *Gaylor*, 112 F.3d at 466). The district court accordingly held that the bad-faith cause of action was preempted by Section 514 and was not preserved by the saving clause. *See id.* at 31a, 36a.

b. The district court also followed *Gaylor*'s discussion of the complete-preemption issue under Section 502(a) of ERISA. The *Gaylor* court had stated that Oklahoma's bad-faith law was completely preempted because it "is designed to provide causes of action for the improper processing of a claim for benefits," is thus "within the scope of ERISA § [502(a)]," and if allowed to proceed "'would pose an obstacle to the purposes and objectives of Congress'" in making § 502(a) exclusive. *Gaylor*, 112 F.3d at 466 (quoting *Pilot Life*, 481 U.S. at 52). The district court adhered to this holding, noting in a footnote that the conflict with ERISA's civil enforcement provision was distinct from the saving-clause analysis under Section 514. *See* Supp. Pet. App. 35a & n.6.

c. Since petitioner's breach of contract claim had been mooted when ALIC paid her all the benefits she was due, and having held the bad-faith claim preempted, the district court entered judgment for ALIC. Supp. Pet. App. 27a-28a.

3. The Tenth Circuit affirmed, agreeing with the district court that petitioner's bad-faith claim was preempted by both Section 514(a) and Section 502(a) of ERISA.

a. In the Tenth Circuit's view, this case required only a straightforward application of this Court's decisions, chiefly *Pilot Life*, and its own precedent in *Gaylor*. Pet. App. 3a, 5a.

This Court held in *Pilot Life* that a Mississippi tort remedy for denial of insurance benefits in bad faith was preempted by Section 514(a) and was not preserved by Section 514(b)(2)(A)'s Insurance Saving Clause. The *Gaylor* decision had applied those principles, concluded that the Oklahoma bad-faith tort was indistinguishable from the Mississippi cause of action at issue in *Pilot Life*, and accordingly held that the Oklahoma cause of action was similarly preempted. The Tenth Circuit found *Gaylor* controlling and reaffirmed its reasoning: Oklahoma's bad-faith law is not saved as an insurance regulation because "'its origins are from general principles of tort and contract law'" and because "[b]reach of any contract, not just an insurance contract, may lead to liability in tort under Oklahoma law." Pet. App. 5a-6a (quoting *Gaylor*, 112 F.3d at 466).

The Tenth Circuit also rejected the contention that intervening decisions of this Court required it to depart from *Gaylor*. The mode of analysis set out in this Court's cases, the court of appeals held, had not changed in substance: "We first inquire whether, from a 'common-sense view of the matter,' the state law regulates insurance. We then test this result against three factors derived from case law interpreting the McCarran-Ferguson Act . . . ." Pet. App. 3a (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985)) (citations omitted). The Tenth Circuit observed that even if this Court had since changed the relative weight to be accorded the various McCarran-Ferguson factors, that development did nothing to undermine *Gaylor*'s core holding, because the *Gaylor* court had concluded that the Oklahoma bad-faith tort satisfied *none* of those factors. *Id.* at 6a.

b. The Tenth Circuit then turned to ERISA § 502(a)'s complete preemption of state-law remedies that impermissibly supplement the forms of relief specified in the federal statute. *See Pilot Life*, 481 U.S. at 52-53 (holding that the remedies provided by Congress in Section 502(a) are exclu-

sive). The court reasoned that Oklahoma permits bad-faith claimants to recover punitive and consequential damages, whereas ERISA does not allow such awards and limits monetary relief to the recovery of benefits due. Pet. App. 7a-8a (citing ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)). Thus, as it had in *Gaylor*, the court of appeals concluded that the bad-faith action would provide a supplemental remedy, in contravention of the congressional intent that Section 502(a) remain the exclusive source of remedies. The court also noted that since *Gaylor* was decided, this Court had reiterated once again that ERISA's remedial provision is exclusive. *See id.* at 7a n.5, 8a (citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377-78 (2002)).

c. Because both Section 514 and Section 502(a) precluded petitioner from pursuing her bad-faith tort claim, the court of appeals affirmed the judgment of the district court. Pet. App. 8a. Petitioner unsuccessfully sought rehearing and rehearing en banc. *Id.* at 9a.

ARGUMENT

Each of the two independent grounds on which the Tenth Circuit rested its preemption decision in this case is sound and compelled by this Court's precedents. Indeed, both of those grounds represent direct application of *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). This Court held in *Pilot Life*, just as the Tenth Circuit held in *Gaylor* and in this case, that the common law tort of bad faith is preempted by Section 514(a) of ERISA, because it is not a "saved" regulation of insurance, and is also completely preempted by Section 502(a), because it provides remedies in addition to those specified in that provision. Thus, on its merits, the Tenth Circuit's decision does not warrant review.

Although some courts other than the Tenth Circuit have misread this Court's precedents with respect to both Section 502(a) and Section 514(a), creating tension with the larger

body of cases that faithfully follow those precedents, this case does not present a suitable vehicle to resolve these conflicts. Indeed, the petition does not even adequately address any conflict. Instead, the petition focuses primarily on the question whether the tort of "bad faith" is preempted—a question that the courts of appeals have unanimously answered in the affirmative—and it places particular emphasis on parochial issues relating to the tort of bad faith as it has developed in Oklahoma. *See* Pet. 13-23. Those issues do not warrant this Court's review.

I. The Court Of Appeals Correctly Applied This Court's Precedents In Holding That Petitioner's Claims Are Preempted Under Sections 514 And 502 Of ERISA

This Court has held on a number of occasions that state tort claims challenging the administration of benefits are preempted by Section 514(a); are not saved from preemption by Section 514(b)(2)(A); and are also independently, and completely, preempted by Section 502(a). Indeed, this Court has unanimously concluded that a state tort claim for bad faith, virtually identical to the one petitioner sought to bring, is preempted by both Sections 502(a) and 514 of ERISA. *See Pilot Life*, 481 U.S. at 49-50, 52-55, 56-57. The court of appeals was not free to depart from those precedents, nor should its entirely correct application of settled preemption principles be disturbed.

A. Petitioner's Contention That The Tenth Circuit Misconstrued Oklahoma Tort Law Does Not Warrant Review

For the most part, the petition simply rehearses policy arguments that this Court has already rejected in *Pilot Life* and its progeny, and that are more properly addressed to Congress. Petitioner's primary legal contention is that review by this Court is warranted because the Tenth Circuit's

interpretation of Oklahoma tort law was erroneous. Pet. 13-23.

The Tenth Circuit showed ample support in both this Court's cases and the law of Oklahoma for its conclusion that Oklahoma's bad-faith tort derives from general common law principles and therefore is not saved as a regulation of insurance. *Compare Pilot Life*, 481 U.S. at 50 ("Even though the Mississippi Supreme Court has identified its law of bad faith with the insurance industry, the roots of this law are firmly planted in the general principles of Mississippi tort and contract law. Any breach of contract, and not merely breach of an insurance contract, may lead to liability for punitive damages under Mississippi law."), *with* Pet. App. 5a-6a ("Even though Oklahoma's Supreme Court has associated its bad faith law with the insurance industry, 'its origins are from general principles of tort and contract law.' . . . Breach of any contract, and not just an insurance contract, may lead to liability in tort under Oklahoma law." (quoting *Gaylor*, 112 F.3d at 466)). Even if *Pilot Life*'s holding were a narrow one, confined to the specific type of tort at issue—which it was not[2]—it would still control this case; the court below found nothing in Oklahoma's common law of tort and contract to distinguish the cause of action petitioner asserted

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[2] *See, e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987) (stating, in a case decided the same day as *Pilot Life*, that the plaintiff's Michigan tort claims were "pre-empted by § 514(a) and [were] not saved by § 514(b)(2)(A)," because they were "based upon common law of general application that is not a law regulating insurance"); *see also Taylor v. Gen. Motors Corp.*, 763 F.2d 216, 217 (6th Cir. 1985) (noting that the tort claims at issue in *Taylor* were for "wrongful termination of disability benefits" and "retaliatory discharge"), *rev'd sub nom. Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

from the similar cause of action held preempted in *Pilot Life*.[3]

Petitioner's exegesis of Oklahoma's bad-faith tort and its common law origins simply does not reveal an error in the Tenth Circuit's judgment that warrants this Court's intervention. The Tenth Circuit faithfully applied this Court's precedents, engaged in the correct mode of analysis, and arrived at a result that is entirely consonant with those reached in other cases presenting identical tort claims. Indeed, the Tenth Circuit—which regularly deals with Oklahoma law and whose analysis thereof is "entitled to respect," *County Court v. Allen*, 442 U.S. 140, 153-54 (1979)[4]—has now *twice* reached

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[3] Indeed, the result the court below reached in this case is entirely consonant with its analysis of other bad-faith torts in the other states within that circuit, as well as the holdings of other circuits. *See, e.g., Moffett v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1237 (10th Cir. 2002) (holding that Wyoming's bad-faith cause of action is preempted by Sections 514(a) and 502(a)); *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 456 (10th Cir. 1989) (reaching the same conclusion with respect to Colorado's bad-faith cause of action); *accord, e.g., Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 582 (6th Cir. 2002) (Indiana); *Howard v. Coventry Health Care of Iowa, Inc.*, 293 F.3d 442, 446-47 (8th Cir. 2002) (Iowa); *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292, 1301 (11th Cir. 2001) (Alabama); *Pryzbowski v. U.S. Healthcare Inc.*, 245 F.3d 266, 270, 273-75 (3d Cir. 2001) (New Jersey); *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1008 (9th Cir. 1998) (Washington); *Tingey v. Pixley-Richards W., Inc.*, 953 F.2d 1124, 1129, 1133 (9th Cir. 1992) (Arizona).

[4] Although interpretations of state law are re-examined de novo on plenary review, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239-40 (1991), this Court in the sound exercise of its certiorari jurisdiction generally leaves purely parochial questions of state law to the regional courts of appeals, *cf.* SUP. CT. R. 10. *See gen-*

the same conclusion with respect to the same bad-faith cause of action, rejecting at each instance the contention that some unique aspect of Oklahoma common law justifies departing from *Pilot Life* and the multitude of other cases holding state bad-faith tort remedies preempted by ERISA.

Moreover, petitioner does not assert—nor could she—that peculiarities of Oklahoma law distinguish her bad-faith claim from Dedeaux's Mississippi claim for purposes of preemption *under Section 502(a)*.[5] Tort damages based on the administration of benefits are not available under ERISA § 502(a) and are therefore preempted by that section. Just as with the Mississippi bad-faith tort that was at issue in *Pilot Life*, the Oklahoma cause of action would disrupt the exclusivity of Section 502(a) by making available punitive and consequential damages when Congress specifically rejected those remedies. *See* Pet. App. 7a-8a; *Pilot Life*, 481 U.S. at 50, 53-54; *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). It is therefore completely preempted by Section

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erally UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 368 (1999) (stating that this Court "do[es] not normally disturb an appeals court's judgment on an issue so heavily dependent on an analysis of state law"); *Bishop v. Wood*, 426 U.S. 341, 346 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

[5] Petitioner argued to the court of appeals that the bad-faith tort does not conflict with the civil enforcement scheme because even though the supplemental tort remedy she seeks is not included in Section 502(a), it is nonetheless somehow essential to ERISA's statutory purpose. As the court of appeals noted, this argument is contrary to all of this Court's cases holding Section 502(a) to be exclusive. *See* Pet. App. 7a n.5.

502(a) irrespective of the branch of Oklahoma common law in which it originated.

B. The Tenth Circuit's Insurance Saving Clause Analysis Is Entirely Consistent With The *Kentucky Health Plans* Decision

The Tenth Circuit issued its decision before this Court's recent opinion in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003), in which the Court reformulated its prior saving-clause case law into a more straightforward two-part test:

> [F]or a state law to be deemed a "law . . . which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, . . . the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Kentucky Health Plans, 123 S. Ct. at 1479 (citations omitted). Although the Court had in the past accorded some significance—albeit less than dispositive—to other factors that were originally developed in cases applying the McCarran-Ferguson Act, the Court disclaimed future reliance on those factors in ERISA saving-clause analysis. *Id.* at 1478-79.

The court of appeals' decision was entirely consistent with the reformulated saving-clause analysis that the *Kentucky Health Plans* Court announced, because it was based on factors that have been central to the saving-clause analysis since *Pilot Life* and that this Court reaffirmed in *Kentucky Health Plans*. Petitioner's contention that the Tenth Circuit's application of these settled principles requires further reexamination, *see* Pet. 2, 21-23, is simply incorrect.

Neither of the elements of the two-part test announced in *Kentucky Health Plans* was new, and the Tenth Circuit con-

sidered both in rejecting petitioner's saving-clause claim That the first element was not a new addition to the test is clear from the Court's citation to an unbroken string of decisions from *Pilot Life* through the more recent *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). *Kentucky Health Plans*, 123 S. Ct. at 1475, 1479 (citing *Rush Prudential*, 536 U.S. at 366; *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 368 (1999); *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); and *Pilot Life*, 481 U.S. at 50). And applying those decisions, the Tenth Circuit has repeatedly found that the Oklahoma bad-faith tort is a general principle of common law whose application is not restricted to insurance, but is available in other contractual contexts as well. Pet. App. 5a-6a; *accord Gaylor*, 112 F.3d at 466.

The second element similarly does not represent a departure from pre-existing law. It has been clear at least since *Rush Prudential*, which the court below discussed at some length (*e.g.*, Pet. App. 3a-4a, 7a-8a), that state laws are saved only if they regulate insurers "'with respect to their insurance practices.'" *Kentucky Health Plans*, 123 S. Ct. at 1475 (quoting *Rush Prudential*, 536 U.S. at 466). A regulation of insurance practices, in turn, is one that "substantially affect[s] the risk pooling arrangement between the insurer and the insured." *Id.* at 1477, 1479. This aspect of the test is substantially similar to the first McCarran-Ferguson factor (*see id.* at 1474, 1478), albeit somewhat less stringent (*see id.* at 1477 n.3). And the Oklahoma bad-faith tort does not survive any version of this analysis; as the Tenth Circuit correctly held, "a law which defines the manner in which insurance claims should be processed" plainly "does not effect a change in the risk borne by insurers and the insured." *Gaylor*, 112 F.3d at 466; *see* Pet. App. 6a.

Thus, the only material changes that *Kentucky Health Plans* made in the saving-clause analysis were the elimination of certain factors and the clarification that a state law

must satisfy *both* elements of the two-part test to be saved. These changes in no way undermine the correctness of the Tenth Circuit's analysis of the Oklahoma tort, because the court of appeals twice concluded that *no* element of the saving-clause analysis weighed against preemption—neither the factors that the *Kentucky Health Plans* Court discarded nor those that it incorporated into the two-part test. Pet. App. 6a-7a (citing *Gaylor*, 112 F.3d at 466).

Petitioner's challenge to this string of holdings therefore rests not on any substantive change in the saving-clause analysis by *Kentucky Health Plans* or any other decision of this Court, but on a mere disagreement with the Tenth Circuit over that court's consistent interpretation of Oklahoma law. *See* Pet. 13-23. This narrow and localized dispute is not one of such national significance that this Court's review is required. And, of course, the Tenth Circuit decision also rested independently on its complete preemption analysis under Section 502(a), which was altogether unaffected by *Kentucky Health Plans*.

II. This Case Does Not Present a Suitable Vehicle For This Court To Resolve Conflicts Raised In Other ERISA-Preemption Cases

Although the Tenth Circuit in this case correctly and faithfully applied this Court's precedents in deciding that petitioner's claim is preempted both by ERISA § 514 *and* by ERISA § 502(a), other courts have permitted certain state-law causes of action against plan administrators to go forward. This Court's review is warranted in an appropriate case—several of which are the subject of currently pending petitions for certiorari—to resolve the conflicts created by

those divergent decisions.[6] This case, however, is not a suitable candidate for plenary review by this Court.

First, the petition devotes absolutely no argument to the complete preemption issue, which in most cases has jurisdictional significance and on which the circuit split is therefore the more pressing. Second, the petition devotes the bulk of its argument to an issue relating to Section 514(b)(2)(A)'s Insurance Saving Clause, an issue that is entirely different from the preemption questions under Section 514(a) on which the circuits have divided. Thus, the petition does not argue *either* of the pressing ERISA-preemption issues pending before this Court in a number of other cases.

A. The Petition Does Not Argue The Question Of Section 502(a) Preemption That It Purports To Present

The petition devotes virtually no argument to the question of complete preemption, which it presents merely as an afterthought. *See* Pet. at i. Complete preemption under Section 502(a), however, is the more important ERISA-preemption issue, both because it has jurisdictional significance that often requires it to be analyzed before "defensive" preemption issues that arise solely under Section 514(a), and because the circuit split over complete preemption is more developed. Yet the petition does not adequately present this question, and the Tenth Circuit resolved the complete preemption issue correctly and in accord with this Court's precedents. Therefore, although the complete preemption issue would merit this Court's review in an appropriate case, it is no basis for disturbing the judgment below.

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[6] Aetna Health Inc. is the petitioner in one such case presenting "complete preemption" issues. *Aetna Health Inc. v. Davila*, No. 02-1845 (docketed June 23, 2003).

The petition does not even mention complete preemption in its argument section. Although one of petitioner's argument headings does assert that the Oklahoma bad-faith tort does not conflict with ERISA's remedial scheme (Pet. 23), that section presents only some further discussion of the saving clause (*see id.* at 26, 27, 28), coupled with some naked policy arguments. *Id.* at 23-25. Furthermore, any assertion that a law that is excepted from the preemptive sweep of Section 514 cannot be completely preempted by the wholly independent Section 502(a)—as petitioner at one point appears to argue, *see* Pet. 26—would be contrary to this Court's cases, as well as to well settled preemption doctrine. *See, e.g.*, *Rush Prudential*, 536 U.S. at 377; *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 & n.9 (1993) ("No decision of this Court has applied the saving clause to supersede a provision of ERISA itself"); *see also Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

Indeed, it is precisely because "complete preemption" under Section 502(a) and "defensive" preemption under Section 514(a) do not perfectly overlap that the complete-preemption question is so important. This Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), established that a claim that falls within the scope of ERISA § 502(a)'s exclusive set of remedies presents a federal question, even if it is pleaded only in state-law terms. *Id.* at 67. Thus, successfully establishing that at least one claim is completely preempted subjects that claim to removal pursuant to 28 U.S.C. § 1441, and in most cases gives the federal court supplemental jurisdiction over the entire action under 28 U.S.C. § 1367. Preemption pursuant to Section 514, by contrast, is only a defense and therefore has no effect on jurisdiction. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983).

In many cases involving ERISA preemption of a state-law cause of action, the case may proceed in federal court

only if federal-question jurisdiction exists on *Metropolitan Life*'s complete-preemption rationale. In such cases, the court's resolution of the threshold issue of jurisdiction also resolves the merits, and the court need not reach the question of preemption pursuant to Section 514(a) or the two-step saving-clause analysis prescribed in *Kentucky Health Plans*.[7]

Not only is the complete preemption question more significant, it is also in more acute need of this Court's resolution. The circuits are sharply divided over whether a State may create a remedy in tort for injuries resulting from an HMO's benefits-administration decision. *Compare, e.g.*, *Elliot v. Fortis Benefits Ins. Co.*, Nos. 02-35080, 02-35133, __ F.3d __, __, 2003 WL 21768395, at *7-*8 (9th Cir. Aug. 1, 2003), *Fink v. Dakotacare*, 324 F.3d 685, 689 (8th Cir. 2003), *Marks v. Watters*, 322 F.3d 316, 318, 326 (4th Cir. 2003), *Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 582 (6th Cir. 2002), *Hotz v. Blue Cross & Blue Shield of Mass., Inc.*, 292 F.3d 57, 58, 60-61 (1st Cir. 2002), *and Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 270, 273-75 (3d Cir. 2001), *with Land v. CIGNA Healthcare of Fla.*, No. 02-15549, __ F.3d __, __, 2003 WL 21751247, at *6 (11th Cir. July 30, 2003), *Cicio v. Doe*, 321 F.3d 83, 102 (2d Cir. 2003), *petition for cert. filed sub nom. Vytra Healthcare v. Cicio*, No. 03-69 (docketed July 14, 2003), *and Roark v. Humana, Inc.*, 307 F.3d 298, 309 (5th Cir. 2002), *petitions for cert. filed sub noms. Roark v. Humana, Inc.*, No. 02-1826 (docketed June 17, 2003), *Aetna Health Inc. v. Davila*, No. 02-1845 (docketed June 23, 2003), *and CIGNA Healthcare of Tex., Inc. v. Calad*, No. 03-83 (docketed July 15, 2003).

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[7] This case is not among the large group in which federal jurisdiction is based exclusively on the complete preemption doctrine, because diversity jurisdiction provided an additional, independent basis for removal. *See* App., *infra*, 1a-4a.

This Court currently has before it the petitions in *Davila*, *Cicio*, and *Calad*, each of which squarely presents the question of complete preemption. A holding of complete preemption in any of those cases would suffice to resolve most, if not all, of the uncertainty that federal courts of appeals currently face in dealing with the preemption of state tort remedies for errors in the administration of health benefits.

B. Petitioner Does Not Raise A Question Of Preemption Under Section 514(a) That Warrants Review

Not only do the legal arguments in the petition focus exclusively on the Section 514 issue, they focus only on narrow aspects of the doctrine that has developed under that section. As discussed above, the petition disputes the Tenth Circuit's interpretation of Oklahoma law and the effect of the saving-clause decisions that this Court has issued since this case was argued below. Neither of those arguments presents a conflict worthy of this Court's review.

All of the court of appeals cases that the petition cites in fact reached the *same* answer to the saving-clause question that the Tenth Circuit did in this case. *See, e.g.*, *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003, 1008 (9th Cir. 1998), *cited in* Pet. at 11; *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1328 n.10 (5th Cir. 1992), *cited in* Pet. at 11-12; *see also Roark*, 307 F.3d at 313 (adhering to *Corcoran* on the Section 514 issue). Indeed, petitioner forthrightly admits that the Seventh Circuit has upheld Rule 11 sanctions against a party who, like petitioner, sought to carve out an exception to *Pilot Life*'s interpretation of the saving clause for his home State's law. *Smith v. Blue Cross & Blue Shield United*, 959 F.2d 655, 657, 659 (7th Cir. 1992) (rejecting the contention "that Mississippi's law applies generally while Wisconsin's law of bad faith is applied only to insurance contracts," and stating that "[n]o reasonable attorney having read *Pilot Life* and [*Metropolitan Life*] could manu-

facture a good faith argument as to why this suit should be brought"), *cited in* Pet. at 2-3.

The only contrary decisions on the saving-clause issue that petitioner presents were rendered by "a scattering of district courts," Pet. 3, and few of them remain good law even in the districts where they were issued. For example, one was reversed outright more than two years ago,[8] two were overruled by their regional circuit in the decision below,[9] and one is directly contrary to controlling circuit precedent and so can be disregarded.[10] This sparse assortment of questionable district-court authority does not present a meaningful conflict on the saving-clause issue that merits plenary review by this Court; indeed, if anything, it demonstrates that the courts of appeals are themselves resolving any intracircuit conflicts on the saving-clause issue consistently and correctly.

To be sure, *other* aspects of Section 514 preemption have caused a dispute in the lower federal and state courts, particularly with regard to the provision of health insurance. That dispute has centered on the meaning of the term "relate to" in Section 514(a), not on the interpretation of the saving

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[8] *Gilbert*, 276 F.3d at 1301, *rev'g in pertinent part* 122 F. Supp. 2d 1267 (N.D. Ala. 2000), *cited in* Pet. at 3.

[9] The Tenth Circuit's decisions in this case and in *Moffett*, discussed above at note 4, negate the contrary holdings of *Lewis v. Aetna U.S. Healthcare, Inc.*, 78 F. Supp. 2d 1202 (N.D. Okla. 1999), *cited in* Pet. at 2-3, and *Colligan v. UNUM Life Insurance Co. of America*, No. Civ.A. 00-K-2512, 2001 WL 533742 (D. Colo. Apr. 23, 2001), *cited in* Pet. at 3.

[10] *Compare Bast*, 150 F.3d at 1008 (holding Washington bad-faith claim *not* saved), *with Norman v. Paul Revere Life Ins. Co.*, No. C99-5463 JKA, 2000 WL 33316829 (W.D. Wash. May 12, 2000) (holding Washington bad-faith claim saved but not citing *Bast*), *cited in* Pet. at 3.

clause of Section 514(b)(2)(A) to which the petition is devoted. For example, the Pennsylvania Supreme Court has announced a categorical rule that "negligence claims against a health maintenance organization do not 'relate to' an ERISA plan" and hence are not preempted by Section 514(a). *Pappas v. Asbel*, 724 A.2d 889, 893 (Pa. 1998). The court reasoned that this Court had retreated from its earlier holdings regarding the breadth of Section 514(a)'s preemption clause. *Id.* at 892-93.

The holding in *Pappas* created a conflict with the decisions of this Court, *see, e.g.*, *Pilot Life*, 481 U.S. at 47-48 (finding "no dispute that the common law causes of action asserted in Dedeaux's complaint 'relate to' an employee benefit plan"), and of numerous other courts faithfully applying those decisions. *See generally* Brief for the United States as Amicus Curiae, *U.S. Healthcare Sys. of Pa., Inc. v. Pa. Hosp. Ins. Co.*, No. 98-1836 (filed Dec. 17, 1999) (urging this Court to grant review and reverse *Pappas*). This Court vacated the Pennsylvania Supreme Court's judgment and remanded for reconsideration in light of *Pegram v. Herdrich*, 530 U.S. 211 (2001). *U.S. Healthcare Sys. of Pa., Inc. v. Pa. Hosp. Ins. Co.*, 530 U.S. 1241 (2001) (mem.). But on remand the Pennsylvania Supreme Court adhered to its erroneous decision. *Pappas v. Asbel*, 768 A.2d 1089, 1091 (Pa. 2001), *cert. denied sub nom. U.S. Healthcare Sys. of Pa., Inc. v. Pa. Hosp. Ins. Co.*, 536 U.S. 938 (2002).

Pappas continues to stand in sharp conflict to the run of cases interpreting Section 514(a). Several courts of appeals have declined to join the *Pappas* court in holding that this Court has retreated *sub silentio* from *Pilot Life*'s interpretation of Section 514(a). *See, e.g.*, *Roark*, 307 F.3d at 313. However, the Second Circuit has recently handed down just such a decision. *See Cicio*, 321 F.3d at 99, 102-03 & n.13. And at least one other State's supreme court has also departed from *Pilot Life*, albeit less sharply, by holding that a

"traditional" state-law claim for medical malpractice does not "relate to" an ERISA plan and thus is not preempted under Section 514(a). *See Eid v. Duke*, 816 A.2d 844, 850, 852 (Md. 2003).

At least two currently pending petitions—those in *Roark*, No. 02-1826, and in *Cicio*, No. 03-69—seek this Court's resolution to this division over Section 514(a). In a suitable case, plenary review of the Section 514(a) question might well be warranted. Of course, as noted in Aetna's brief in *Roark*, it would be appropriate to decide the Section 502(a) issue first, because in many cases—including both *Roark* and *Cicio*, but not this case—federal jurisdiction was based on complete preemption and that doctrine therefore necessarily comes first in the analysis. *See* Brief for Respondent Aetna Health Inc. at 3-4, *Roark v. Humana, Inc.*, No. 02-1826 (filed July 7, 2003).

But even presuming that the question of preemption under Section 514(a) continues to warrant this court's review, the argument based on the conflicting interpretations of Section 514(a) is not presented in this case. The petition never argues that Oklahoma's cause of action for bad faith does not "relate to" the ERISA plan; it contends only that the cause of action is nonetheless saved as a regulation of insurance. Indeed, as the Tenth Circuit noted, in the lower courts it was "*undisputed* [that] Oklahoma's bad faith law falls within [ERISA's] language preempting state laws related to 'any employee benefit plan.'" Pet. App. 5a (emphasis added). Petitioner's briefs in the court of appeals were devoted to the complete preemption doctrine, the impact of the saving clause (including the contention that the saving clause negates the complete preemption doctrine), and the proposed formulation of a federal common law remedy to supplement those available under Section 502(a). Petitioner did not rely on *Pappas* or make the argument that the Pennsylvania Su-

preme Court erroneously accepted in that case. Nor does she make that argument here.

Accordingly, this case is not a suitable vehicle to resolve the dispute over Section 514(a), and the questions relating to Oklahoma common law and Section 514(b)(2)(A) that the petition does present are not the subject of such a well developed conflict—or, indeed, any meaningful conflict—among the lower courts.

* * *

The petition in this case does not present the cert-worthy question of ERISA "complete preemption" under Section 502(a) that is pending before this Court in *Davila*, *Calad*, and *Cicio*. Nor does federal jurisdiction in this case turn on the applicability of complete preemption; it is unquestioned that this case satisfies the requirements for diversity jurisdiction, which the removal papers expressly invoked. *See* App., *infra*, 1a-4a. Further, this case does not present the question of "defensive" preemption under Section 514(a) that is currently pending before this Court in *Roark*—a question that might be cert-worthy in an appropriate case, though it is not well presented in *Roark* itself because the petitioner in *Roark* has ignored the necessarily antecedent issue of jurisdiction under the "complete preemption" doctrine. Instead, the only issue that this case presents is whether ERISA's saving clause permits a plaintiff to sue her plan administrator in tort for bad faith, a contention that the circuits have unanimously rejected in fidelity to this Court's holding in *Pilot Life*. For those reasons, this Court need not hold the petition pending its disposition of *Davila*, *Calad*, *Cicio*, and *Roark*, but rather should deny the petition outright.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the Court's consideration of the petitions in *Davila*, *Calad*,

Cicio, and *Roark*, and disposed of as appropriate in light of the resolution of those cases.

Respectfully submitted.

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August 26, 2003

APPENDIX

APPENDIX A

FILED

JUL 07 2000

SALLY HOWE SMITH,
COURT CLERK
STATE OF OKLA.
TULSA COUNTY

FILED

JUL 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SALLEE A. CONOVER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00CV0559B (J)
	)	
AETNA US HEALTHCARE, INC.	)	(formerly Tulsa County District Court Case No. CJ-2000-2700)
	)	
Defendant.	)	

NOTICE OF REMOVAL

Defendant Aetna US Healthcare, Inc. ("Aetna" or "Defendant"), pursuant to 28 U.S.C. §§ 1441-1448, hereby removes this case to the United States District Court for the

Northern Ditrict of Oklahoma. In support of removal Aetna states as follows:

I. 29 U.S.C. § 1332.

1. Aetna is the defendant in a state court action brought against it by Plaintiff in the District Court of Tulsa County, State of Oklahoma, entitled Sallee A. Conover v. Aetna US Healthcare, Inc., Case No. CJ-2000-2700.

2. This is a civil action where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states. Federal jurisdiction therefore exists under 28 U.S.C. § 1332.

3. At all times from the filing of this action through and including the present, Aetna is and has been a corporation duly organized and existing under the laws of the State of Pennsylvania with its principal place of business in the State of Pennsylvania. Aetna has not been incorporated under the laws of the State of Oklahoma and does not have its principal place of business in the State of Oklahoma. Aetna is therefore considered a citizen of the State of Pennsylvania for the purposes of diversity jurisdiction under 28 U.S.C. § 1332(c)(1).

4. Plaintiff's petition states that she resides in Tulsa County, Oklahoma. On information and belief, at all times from the filing of this action through and including the present, plaintiff is and has been a resident of the State of Oklahoma. Plaintiff is not and has not been a resident of the State of Pennsylvania.

5. Plaintiff's petition alleges intentional breach of contract and breach of good faith and fair dealing by an alleged insurance carrier. Plaintiff's petition requests both actual damages and punitive damages. In violation of 12 O.S. § 2008(A)(2), plaintiff's petition seeks damages in excess of fifty thousand dollars ($50,000.00) for "each instance." The petition asserts two counts, so on its face, the petition ostensi-

bly seeks in excess of $100,000.00, exclusive of interest and costs.

6. Additionally, the petition seeks an unspecified amount of extracontractual and punitive damages. The Court must consider this demand in determining whether the amount in controversy exceeds the jurisdictional amount.

7. Aetna denies that it is liable to the plaintiff. However, plaintiff is seeking to maximize her recovery, and it is reasonable to conclude that plaintiff seeks in excess of $75,000.00, exclusive of interest and costs. Awards in lawsuits for alleged breach of insurance contract and bad faith frequently exceed the sum or value of $75,000.00, exclusive of interest and costs. Additionally, punitive awards alone frequently exceed the jurisdictional amount. It therefore does not appear to a legal certainty that the plaintiff could not recover in excess of the jurisdictional amount under 28 U.S.C. § 1332.

8. The matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs.

II. 29 U.S.C. § 1132(e)(1).

9. This is an action by a beneficiary of an employee benefit plan as defined under 29 U.S.C. § 1002(3), to recover benefits. Federal jurisdiction therefore exists pursuant to 29 U.S.C. § 1132(a)(1)(B) and § 1132(e)(1).

10. Plaintiff has been an employee of Harcourt General, Inc. ("Harcourt"). Harcourt established various plans, funds and programs, including a plan for disability benefits issued by Aetna ("Plan"), for the purpose of providing benefits to its participants or their beneficiaries. These plans are governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"), and plaintiff is a participant in the Plan.

11. Plaintiffs petition expressly seeks the recovery of benefits. All benefits provided to plaintiff in connection with

her employment were provided to her through ERISA covered plans, and specifically through the Plan. Copies of the relevant portions of various documents for the Plan are attached hereto as Exhibit "A" and made a part hereof).

12. As a suit by a participant and beneficiary to recover benefits from an ERISA covered plan, plaintiff's lawsuit is governed by 29 U.S.C. § 1132(a)(1)(B), which provides an exclusive federal cause of action for resolution of such disputes. Therefore, this case is removable under 28 U.S.C. § 1441(b), in accord with *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63, 95 L.Ed.2d 55, 62 (1987).

13. Plaintiff's state law claims, theories, and requests for relief relate to her claim for benefits and are preempted by ERISA. *See Pilot Life Ins. Co. v. Taylor*, 481 U.S. 41, 95 L.Ed.2d 39 (1987). In *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.2d 460 (10th Cir. 1997), the plaintiff argued that both Oklahoma statutory and decisional law was saved from ERISA preemption. *See* plaintiff-appellant's briefs in *Gaylor*, attached hereto as Exhibit "B" and made a part hereof. The Tenth Circuit rejected those arguments in its published decision which is controlling herein.

III. 28 U.S.C. § 1331.

14. This is a civil action arising under the laws of the United States. Federal jurisdiction therefore exists under 28 U.S.C. § 1331.

IV. Process

15. The aforementioned action was commenced on June 6, 2000, on which date plaintiff filed her petition in this action with the state court. Service was accomplished by certified mail on June 8, 2000. This notice of removal is therefore timely filed under the provisions of 28 U.S.C. § 1446, and this action is removed under 28 U.S.C. §§ 1441-1448.

16. Copies of all process, pleadings and orders served upon Defendant in the state court action are attached hereto as Exhibit "C" and made a part hereof.

Dated this 7th day of July, 2000.

Respectfully submitted,

/s/

Mark D. Spencer, OBA # 12493
Henry D. Hoss, OBA # 11354
Cody L. Towns, OBA #17457
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Telecopier No. (405) 235-0439

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2000, the foregoing was filed with the Court Clerk for the United States District Court for the Northern District of Oklahoma and that a true and correct copy was hand-delivered to:

Sally Howe Smith
Court Clerk
District Court of Tulsa County
200 Courthouse
500 South Denver
Tulsa, OK 74103-3844

and mailed, postage prepaid and addressed to:

Maynard I. Ungerman
Stephen J. Greubel
1323 E. 71st Street
Suite 300
Tulsa, OK 74136

/s/
Mark D. Spencer

[Exhibits A & B to Notice of Removal Omitted]

* * *

[Excerpt of Exhibit C to Notice of Removal]

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

FILED

JUN - 6 2000

SALLY HOWE SMITH,
COURT CLERK
STATE OF OKLA.
TULSA COUNTY

SALLEE A. CONOVER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: CJ 2000-02700
	)	
AETNA US HEALTHCARE, INC.	)	Judge:
	)	
	)	
Defendant.	)	

PETITION

COMES NOW the Plaintiff, Sallee A. Conover (hereinafter referred to as "Conover") and for her cause of action against the Defendant, Aetna U.S. Healthcare, Inc. (hereinafter referred to as "Aetna") alleges and states as follows:

FIRST CAUSE OF ACTION

Intentional Breach of Contract

1. Plaintiff is a citizen and a resident of the city of Tulsa, County of Tulsa, State of Oklahoma.

2. Defendant Aetna is a Corporation formed and existing under the laws of the State of Oklahoma authorized to issue medical and health insurance policies and authorized to do business and is doing business within the State of Oklahoma.

3. This Court has both venue and jurisdiction over the parties and subject matter of this action.

4. Plaintiff is a named beneficiary under a "certificate of coverage" with Defendant Aetna pursuant to a policy issued through her employer Harcourt General, Inc. Group control number 657241 for managed disability benefit plan. Said policy was issued with her employer as a part of the benefits of said employment but Plaintiff paid for the premiums personally.

5. That as a result of an accident incurred by Plaintiff on November 12, 1997, Plaintiff was receiving payments under said policy for disability.

6. That thereafter on August 12, 1999, the Plaintiff received a notification from Defendant that effective June 30, 1999, all disability payments to Plaintiff would cease.

7. Said determination was arbitrary, capricious and in violation of the terms of the agreement between Plaintiff and Defendant and further, efforts to obtain evidence claimed by Aetna as to the right to terminate said payments was withheld for a substantial period of time by Defendant from Plaintiff and said evidence did not justify terminating said policy.

8. Thereafter and in accordance with the contractual provisions, Plaintiff appealed the determination made by Defendant.

9. Plaintiff appealed the determination made by Aetna pursuant to the notifications given by Defendant to Plaintiff. As part of said appeal, Plaintiff submitted to Defendant Aetna, rulings of the Social Security Administration that she is still disabled as well as affidavits to the same affect. Defendant has refused to answer any further correspondence relative to said matter and refuses to make a ruling on Plaintiff's appeal.

10. All of said conduct is in direct violation of the contract in effect between Plaintiff and Defendant.

WHEREFORE, Plaintiff prays that on this her first cause of action that she be awarded recompense for all past disability payments due, all expenses incurred as a result of having to purchase other insurance, and that a permanent Order be entered requiring Defendant to continue to make said payments pursuant to the contract with Plaintiff, that Plaintiff be awarded her attorneys fees herein; interest and costs.

SECOND CAUSE OF ACTION

Breach of good faith and fair dealing by Insurance carrier

Plaintiff reincorporates and restates all matters here and before set forth herein and incorporates them as part of this second cause of action.

11. Plaintiff believes and therefore alleges that Defendant deceitfully and in bad faith and contrary to fair dealing has ceased and refused to pay Plaintiff the sums due her under said contract as a result of her physical disability.

12. That in addition thereto Defendant has refused to answer correspondence or telephone calls of Plaintiff and/or her attorney and refused to comply with the terms of their own agreement relative to a review of any termination of benefits.

13. Defendant has failed to deal fairly and in good faith with this Plaintiff commencing with the termination of her

benefits; by refusing to allow her for a lengthy period of time to have access to a report which Defendant claimed denied grounds for Plaintiff's payment of medical benefits; by not attempting in good faith to effectuate a prompt, fair and equitable payment of sums due to Plaintiff; by denying payment and claiming said payment was not medically necessary when in reality it was based on Plaintiff s condition and as evidenced by the Social Security Administration classifying Plaintiff as disabled; and by Defendant failing to perform its respective duties to see the Plaintiff was timely paid.

14. By reason of the gross, willful and wanton negligent, deceitful misrepresentation, bad faith and oppressiveness exercised by this Defendant, Plaintiff believes and therefore alleges that she has suffered substantial economic loss, humiliation, anguish, mental and emotional pain and suffering all in excess of fifty thousand dollars.

15. Plaintiff further alleges that she is entitled to exemplary or punitive damages in order to make an example of this Defendant as and for punishment and to act as a determent to others similarly situated.

WHEREFORE as to Plaintiff's second cause of action, Plaintiff prays for both actual and punitive damages in an amount in each instance in excess of fifty thousand dollars against this Defendant, together with interest, costs and attorneys fees as provided for by law.

/s/

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* * *